89 85

No. _____

Supreme Court, U.S.
FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK E. FLEMING

Petitioner

vs.

SANDRA I. ROTHENBERG,
KIM B. CHILDS,
DAVID L. KOFOED,
SCOTT R. LARSON,
THE LAW FIRM OF COOPER & KELLEY, P. C.,
AMERICAN HOME ASSURANCE COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Submitted by:

Jack E. Fleming
3624 Citadel Drive North,
Suite 250
Colo. Spgs., Colo. 80909
(719) 598-5286

Petitioner is Pro Se.

QUESTIONS PRESENTED FOR REVIEW

1. Whether any of the Petitioner's seven (7) claims for relief as stated in the complaint alleging violation and/or deprivation of certain federal constitutional rights and so noted by the U. S. Court of Appeals in its order and judgment (Appendix B) states a cause of action pursuant to Title 42 USC sec. 1983.

2. Whether the U. S. Court of Appeals "erred" when affirming the order of the District Court to dismiss this action for the lack of subject matter jurisdiction.

3. Whether the Petitioner, pro se, can legally file lawsuits in the federal court against state court judges, prominent law firms, and prominent attorneys pursuant to Title 42 USC sec. 1983 for alleged violation and/or deprivation of one's federal constitutional rights under the color of state law.

4. Whether the District Court has jurisdiction pursuant to 28 USC 1331 and 28 USC

1343 to review state court orders issued and state court procedures used in a state court action to determine if any of the Petitioner's federal constitutional rights were violated and/or deprived from him during the state court litigation process in Fleming v. Kofoed pursuant to Title 42 USC sec. 1983 as so alleged in his complaint.

5. Whether the U. S. Court of Appeals denied the Petitioner procedural due process of law by not allowing the Petitioner the use of 10th Circuit Court Rule 33.2 Settlement Conferences before briefs were submitted to the court for determination as so stated in Rule 33.2.

6. Whether the U. S. Court of Appeals can legally grant an award of damages and double costs pursuant to FRAP Rule 38 and 28 USC sec. 1912 for the taking of a frivolous appeal without stating any findings of fact and conclusions of law to support their

award when the appeal was legally taken pursuant to FRAP Rule 3(a) and Rule 4(a)(1).

7. Whether the Petitioner, as a citizen of the United States all of his life, is actually covered by the U. S. Constitution and its amendments and is entitled to sue other parties and defend himself as a pro se litigant in any or all of the courts within the United States and its territories.

PARTIES TO PROCEEDINGS BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this case.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JACK E. FLEMING,

Petitioner

vs.

SANDRA I. ROTHENBERG,
KIM B. CHILDS,
DAVID L. KOFOED,
SCOTT R. LARSON,
THE LAW FIRM OF COOPER & KELLEY, P. C.,
AMERICAN HOME ASSURANCE COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPELAS
FOR THE TENTH CIRCUIT

The Petitioner, Jack E. Fleming, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS OF COURTS BELOW

Opinions of lower courts cited below:

Jack E. Fleming v. Sandra I Rothenberg, et. al., Case No. 88-F-490, (Appendix A)

Jack E. Fleming v. Sandra I Rothenberg, et. al., Case No. 88-1922, (Appendix B)

Jack E. Fleming v. Sandra I. Rothenberg, et. al., Case No. 88-1922, (Appendix C)

JURISDICTION

1. The jurisdiction of the U. S. District Court was invoked pursuant to 28 USC 1331 and 28 USC 1343. The order dismissing the Petitioner's action is dated May 19, 1988.

2. The date of the opinion and order of the United States Court of Appeals for the Tenth Circuit stating that the federal courts do not have jurisdiction to review state court judgments is dated March 7, 1989. The order denying Petitioner's request for a rehearing and suggestion for rehearing en banc was entered by the Court of Appeals on April 17, 1989.

3. The jurisdiction of this Court is invoked pursuant to 28 USC 1254.

STATEMENT OF THE CASE

On March 30, 1988, the Petitioner filed this action in the U. S. District Court for the District of Colorado pursuant to Title 42 USC sec. 1983, and the District Court had jurisdiction in the case pursuant to 28 USC 1331 and 28 USC 1343. The Petitioner alleged in his complaint that his federal constitutional rights had been deliberately violated during the litigation process in the state court action known as Fleming v. Kofoed. As alleged in the Petitioner's complaint, he had been denied due process of law, equal protection under the law, and access to the courts when Respondent Rothenberg denied the Petitioner's motion for judgment on the pleadings in Fleming v. Kofoed. The Defendants in that case had admitted under oath their negligence to the Petitioner in interrogatories submitted to them and answered by them in that case. Judge Rothenberg never gave any findings of fact or conclu-

sions of law to support her dismissal of the Petitioner's motion. Respondent Rothenberg then granted summary judgment to the Defendants in that action, thereby, dismissing all of the Petitioner's case in Fleming v. Kofoed which was a flagrant violation of the Petitioner's federal constitutional rights. Respondent Rothenberg again violated the Petitioner's constitutional rights in that action when she refused to rule on the validity of her judgments in Fleming v. Kofoed pursuant to a motion for relief from judgment. The Petitioner supplied the District Court all of the documents (exhibits) needed to show and prove that he had indeed been denied and deprived of his federal constitutional rights as alleged in his complaint. The only court in the United States to have jurisdiction over the deprivation of federal rights pursuant to 42 USC sec. 1983 is the U. S. District Court. The state trial courts and the state appellate courts

do not have jurisdiction over the violation of federal rights pursuant to 42 USC sec. 1983.

The Petitioner alleged that Judge Rothenberg violated and/or deprived the Petitioner of his federal rights when she denied the Petitioner's motion for judgment on the pleadings, granted summary judgment to the Defendants, and refused to rule on the Petitioner's Rule 60(b)(3) motion pursuant to the Colorado Rules of Civil Procedure in Fleming v. Kofoed. The Petitioner asked Judge Rothenberg to rule on the validity of her own judgments, but she absolutely refused to do so. Judge Rothenberg had jurisdictional powers pursuant to CRCP Rule 60(b)(3) to make such a ruling. In re the Marriage of Stroud 631 P2d 168 (Colo. S. Ct. 1981), the Colorado Supreme Court ruled as follows:

> Where motion to set aside judgment alleges that judgment is void, trial court has no discretion; judgment is either void or it isn't and relief must be afforded accordingly. Rules of Civil Procedure, Rule 60(b)(3).

In the Colorado Rules Annotated, 2nd, Rule 60, Section 60.5, Discretion of the Court, it states as follows:

> Where the court has acted contrary to law in rendering judgment, there is no discretion involved in determining that a motion for relief should be granted, and the court is bound to grant the motion. See e. g. Marriage of Stroud 631 P2d 168 (Colo. 1981).

The District Court order (Appendix A) is in complete error. The 10th Circuit decision in Anderson v. Colorado 793 F2d 262 (1986) does not apply in this case, and the District Court knew or should have known that at the time of its ruling. Besides, this Court never ruled on the constitutionality or content of Anderson v. Colorado, supra, because the appellant in that case never asked this Court to review that decision. The Petitioner is questioning the quality, extensiveness and fairness of procedures followed by the state court in Fleming v. Kofoed, so the circumstances are not the same as in Anderson v. Colorado, supra. The District Court,

the Court of Appeals and this Court have the duty and the jurisdiction to examine the quality, extensiveness and/or fairness of procedures used in the prior litigation in state court, and the redetermination of the issues in federal court is warranted if such doubt exists. The Petitioner alleged in his complaint and responses to Defendants' motions to dismiss this case his doubt as to the quality, extensiveness, and/or fairness of procedures followed in Fleming v. Kofoed, but both the District Court and the Court of Appeals absolutely refused to redetermine the issues as mandated by the Court of Appeals in its own opinion in Morgan v. City of Rawlins 792 F2d 975 (10th Cir. 1986) and this Court's decision in State of Montana v. United States 440 US 147, 59 L Ed 2d 210, 99 S. Ct. 970 (1979). The Court of Appeals used this Court's decision in Montana v. U.S., supra, as the legal authority for its decision in Morgan v. Rawlins, supra.

In England v. Louisiana State Board 375 US 411, 11 L Ed 2d 440, 84 S. Ct. 461 (1964), this Court ruled as follows:

> When a federal court is properly appealed to in a case over which it has jurisdiction, it is its duty to take such jurisdiction.
>
> The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied.
>
> In cases where, but for the application of the abstention doctrine, the primary fact determination would have been made by the Federal District Court, a litigant may not be unwillingly deprived of that determination; the possibility of appellate review by the Supreme Court of a state court determination may not be substituted against a party's wishes, for his right to litigate his federal claim in the federal courts.

The Petitioner had a perfect right to come to the District Court and file suit for the deprivation of his federal rights whether or not he had filed any appeals with the state appellate courts. That is the only reason that Congress enacted 42 USC 1983.

In State of Montana v. United States, supra, this Court ruled as follows regarding

the abstention doctrine and the policy of redetermining the issues:

> The abstention doctrine may not be used as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions.
>
> The redetermination of issues is warranted is there is reason to doubt quality, extensiveness, or fairness of procedures followed in prior litigation.

The District Court and the Court of Appeals were under direct orders from this Court to not apply the abstention doctrine when a federal question was at hand, and that these same courts were to redetermine the issues when there was doubt regarding fairness of procedures used in the prior litigation. The Petitioner feels that he has not yet been afforded the benefits of this Court's rulings regarding those subjects.

In Garcia v. Wilson 731 F2d 640 (10th Cir. 1984), the Court of Appeals ruled regarding claims brought to the federal court pursuant to 42 USC 1983. The Petitioner

feels that he proved to both the District Court and the Court of Appeals that his federal constitutional rights had been denied him under the color of state law. All of those facts were stated and clearly established with exhibits in the Petitioner's complaint as filed in the District Court. In Monroe v Pape 365 US 167, 5 L Ed 2d 492, 81 S. Ct. 473 (1961), this Court ruled regarding the federal statute known as 42 USC 1983. In that decision, this Court made it very clear what the intent and use of the statute 42 USC 1983 was to be involving the alleged deprivation of one's federal constitutional rights. The Petitioner feels that his claims for relief stated several causes of action pursuant to 42 USC 1983 and did so beyond any doubt.

In Verner v. State of Colorado 533 F. Supp. 1109 (D. Colo. 1982), affirmed 10th Cir. (1983), 716 F2d 1352, cert. denied 466 US 960, the court stated that state officials may be sued in their personal

capacity for damages in a federal action because the Eleventh Amendment grants them no immunity even when they are acting in their official capacity. In Pulliam v. Allen 466 US 522, 80 L Ed 2d 565, 104 S. Ct. 1970 (1984), this Court ruled that Congress intended 42 USC 1983 to be an independent protection for federal rights and nothing suggested that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from collateral review.

The federal constitutional rights of the Petitioner as secured by the U. S. Constitution, namely, Amendments 1, 5, 14 were deliberately violated by all Respondents as alleged. The Petitioner proved his case by submitting to the District Court all of the documents necessary to prove his points of law and establish beyond any doubt that his federal rights had indeed been violated as alleged.

The Petitioner also feels that he was

severly discriminated against when he was denied by the U. S. Court of Appeals the priviledges stated in Rules of Court for the 10th Circuit, Rule 33.2 Settlement Conferences. The rule reads as follows:

> Settlement conferences shall be conducted in all civil proceedings which do not seek relief from criminal conviction. Within 10 days after notice that the matter has been set for oral argument, or after notice that the court intends to submit the matter on the briefs, counsel for the appellant/petitioner shall initiate a conference with counsel for the appellee/respondent regarding prospective settlement of the issues of appeal.

The Petitioner was never given the opportunity to try and settle the issues on appeal with the Respondents. The U. S. Court of Appeals issued its ruling on March 7, 1989 before any notice to attempt to settle was given to the Petitioner. Secondly, the opinions in this case, 88-1911, 88-1913 and 88-1918 were all treated the same. These opinions were all written by the same three (3) circuit judges, all written within a three (3) day period, and all four (4)

opinions read almost word for word throughout the opinion. The Petitioner feels that he has been severely discriminated against because he feels that he is entitled to have his cases ruled on by more than the same three (3) judges. The Petitioner feels that the Court of Appeals committed severe judicial discrimination against the Petitioner because the court should have given at least two (2) cases to other judges to see if the opinions of those judges would have been the same.

The Petitioner's appeal in this case was filed in good faith and as a matter of law pursuant to FRAP Rule 3(a) and Rule 4(a)(1). The Petitioner filed this appeal and proceeded with this appeal because he felt that the District Court had "erred" when it dismissed the Petitioner's sec. 1983 action for the reasons stated in the District Court's order. The Petitioner felt that his appeal was the only and correct way to correct errors made by the District

Court. The Petitioner does not believe that his appeal in this case is legally frivolous. This Court must not allow the precedence to be set that pro se litigants cannot appeal their cases to the 10th Circuit without the fear of being assessed damages and double costs because they exercised their constitutional right of appeal, which is a form of the right of access to the courts.

REASONS FOR GRANTING THE PETITION

1. All of the Petitioner's claims for relief stated causes of action in this case pursuant to Title 42 USC 1983. Petitioner was denied access to the courts by both the District Court and the U. S. Court of Appeals.

2. It has been established by this Court that Title 42 USC 1983 can be used to legally file suit against state court judges and other prominent judicial people including attorneys who are alleged to have violated one's federal constitutional rights.

3. The U. S. Court of Appeals "erred" when it affirmed the order of the District Court. The U. S. District Court did have the proper jurisdiction to hear Petitioner's claims for relief pursuant to 28 USC 1331 and 28 USC 1343.

4. This Court must allow certiorari in this case because the Petitioner's rights were violated by the Respondents in this action along with the District Court and the U. S. Court of Appeals.

5. The U. S. Court of Appeals denied the Petitioner his procedural due process rights by not allowing the Petitioner the use of 10th Circuit Court Rule 33.2, namely, Settlement Conferences before briefs were submitted to the court for determination.

6. The appeal to the U. S. Court of Appeals was not legally frivolous. The Petitioner's appeal was filed in good faith and as a matter of law pursuant to FRAP Rule 3(a) and Rule 4(a)(1). The U. S. Court of Appeals failed to state findings of fact and

conclusions of law to support its ruling that the appeal was legally frivolous. The Respondents in this case are not entitled to damages and double costs as so awarded by the U. S. Court of Appeals.

7. To deny this petition for certiorari would mean that the Petitioner is not covered by the U. S. Constitution. The District Court, the U. S. Court of Appeals and the Respondents have all deprived the Petitioner of certain of his federal constitutional rights during the litigation process. This Court must restore those rights. It cannot be allowed to be established that the federal courts can permanently deprive one of his federal constitutional rights. This will set a precedence that only a few within the United States would really want to be set. A person must be allowed to go to court pro se, and during the litigation process that follows, that person cannot be deprived of one or more of their federal consti-

tutional rights by the federal courts or any other courts within the United States and its territories. That must be an absolute mandate proclaimed by this Court in this case. This mandate must become the law of the land.

CONCLUSION

The only real question in this petition for this Court to determine is whether the Petitioner is covered by all of the individual rights, liberties and priviledges as stated in the U. S. Constitution and its amendments, namely, the First Amendment, the Fifth Amendment and the Fourteenth Amendment. The Petitioner was born a citizen of the United States of America and has lived in this country all of his life. It appears to the Petitioner that so far all of the lower courts, both state and federal, believe that the Petitioner is not covered by the U. S. Constitution. If the Petitioner, as a citizen of the United States of America, is indeed covered by all

of the rights, priviledges and liberties as so stated in the U. S. Constitution, then this Court must grant certiorari in this case. A denial of this petition would affirm the District Court order, affirm the order and judgment of the U. S. Court of Appeals, and affirm all state court orders and procedures that violated the Petitioner's federal constitutional rights, and establish once and for all, that the Petitioner is just not covered by the U. S. Constitution.

This Court must now come into this case and accept jurisdiction as should have been done by the District Court and the U. S. Court of Appeals as so stated by this Court in England v. Louisiana State Board, supra. This Court must then wipe away the stigma of the abstention doctrine left by the District Court and the Court of Appeals and redetermine all of the issues in this case as mandated by its own opinion in State of Montana v. United States, supra. This

Court must do this because all other lower courts have refused to do so. This Court must now determine if the Petitioner's federal constitutional rights were ever violated, and if so, must **reinstate** these rights and remand this case back to the District Court for a trial for damages pursuant to Title 42 USC sec. 1983.

The Petitioner respectfully requests that this Court grant certiorari in this case and that this Court decide once and for all whether the Petitioner, as a citizen of the United States, is truly covered by the U. S. Constitution and all of its respective amendments as a citizen and also as a pro se litigant.

Respectfully submitted,

Jack E. Fleming

Jack E. Fleming, Petitioner
3624 Citadel Drive North, # 250
Colo. Sprgs., Colo. 80909

Petitioner is Pro Se.

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the Petitioner's petition for writ of certiorari, postage prepaid, this 10th day of July, 1989 to:

Gregg E. Kay, Esquire
First Assistant Attorney General
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

John M. Law, Esquire
Law, Knous & Keithley
1873 South Bellaire Street, Suite 1415
Denver, Colorado 80222-4347

Judi E. Flemming

APPENDIX

APPENDIX A

APP 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-F-489

JACK E. FLEMING,

Plaintiff,

v.

WARREN O. MARTIN, SANDRA I. ROTHENBERG, CONNIE L. PETERSON, KIM B. CHILDS, FRANK W. VISCIANO, PAUL E. VRANESIC II, THE LAW FIRM OF COOPER & KELLY, P. C. and THE HOME INSURANCE COMPANY,

Defendants.

Civil Action No. 88-F-490

JACK E. FLEMING,

Plaintiff,

v.

SANDRA I. ROTHENBERG, KIM B. CHILDS, DAVID L. KOFOED, SCOTT R. LARSON, THE LAW FIRM OF COOPER & KELLY, P.C. and AMERICAN HOME ASSURANCE COMPANY,

Defendants.

APP 2

ORDER ON MOTIONS TO DISMISS

Sherman G. Finesilver, Chief Judge

These two related cases arise out of a legal malpractice suit filed by plaintiff in Denver County District Court. Plaintiff alleges defendants violated his constitutional rights by ruling adverse to him in the state court action. Defendants Martin, Rothenberg and Peterson have filed a Motion to Dismiss in both cases.

Plaintiff is seeking relief from state trial court rulings unfavorable to him. Federal district courts are without jurisdiction to review state court judgments where the relief sought is in the nature of appellate review. Anderson v. State of Colorado, 793 F.2d 262, 263 (10th Cir. 1986). Plaintiff's remedy is in the state court system.

ACCORDINGLY, defendants' Motion to Dismiss is GRANTED. The complaints and causes of action in 88-F-489 and 88-F-490 are DISMISSED.

DATED the 19 day of May 1988, at Denver, Colorado.

BY THE COURT:

Sherman G. Finesilver

Chief Judge

United States District Court

APPENDIX B

APP 4

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

Robert L. Hoecker (303)844-3157
Clerk March 7, 1989 FTS 564-3157

Mr. James R.Manspeaker
Clerk
U.S. District Court of the District of Colorado
C-145 United States Courthouse
Denver, CO 80294

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1873 S. Bellaire
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Mr. Gregg E. Kay
Office of the Attorney General
State of Colorado
1525 Sherman Street
Third Floor
Denver, CO 80203

Mr. Jack E. Fleming
3624 Citadel Drive North
Suite 250
Colorado Springs, CO 80909

Re: 88-1922, Fleming v. Rothenberg
(Lower docket: 88-C-490,)

APP 5

Dear Mr. Manspeaker, Mr. Fleming and Counsel:

The court's order and judgment was filed in the subject case today. A copy of the order and judgment is enclosed for all parties.

In accordance with Fed. R. App. P. 41, I enclose for the clerk of the trial court, or for the named agency, a certified copy of the order and judgment, which constitutes the mandate. By direction of the curt, the mandate shall be filed immediately in the records of the trial court or agency. I also enclose for the clerk of the trial court, or for the named agency, a mandate receipt. Please sign this receipt and return it to this office. Please call this office if you have questions.

Very truly yours,

ROBERT L. HOECKER, Clerk

RLH:kmh

enclosure

cc: Honorable Sherman G. Finesilver, Chief Judge

APP 6

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JACK E. FLEMING Plaintiff-Appellant, v. SANDRA ROTHENBERG; KIM B. CHILDS; DAVID KOFOED; SCOTT LARSON; LAW FIRM OF COOPER & KELLEY; AMERICAN HOME ASSURANCE COMPANY, Defendants-Appellees.	)	No. 88-1922 (D.C. No. 88-F-490) (D. Colo.)

ORDER AND JUDGMENT*

Before ANDERSON and TACHA, Circuit Judges, and ROGERS, District Judge.**

** The Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th cir. R. 36.3.

Plaintiff commenced this action pursuant to 42 U.S.C.1983 alleging defendants violated plaintiff's constitutional rights during the course of an action plaintiff commenced in state court. Plaintiff commenced a legal malpractice action in Colorado state court against defendants Kofoed and Larson. Defendant Childs represented defendants Kofoed and Larson in the legal malpractice action. Defendant Rothenberg, the judge before whom the state court action was proceeding, denied plaintiff's motion for a directed verdict and granted defendants' motion for summary judgment.

In his federal complaint, plaintiff asserted seven 1983 claims: (1) defendant Rothenberg denied plaintiff due process by denying plaintiff's motion for a directed verdict and granting defendants' motion for summary judgment; (2) defendants conspired to deny plaintiff due process; (3) defendants denied plaintiff his first amendment right of access to the courts; (4) defendant Rothenberg was grossly negligent in granting summary judgment in favor of the state court defendants; (5) defendant Rothenberg denied plaintiff equal protection of the laws by ruling against plaintiff; (6) defendant Rothenberg abused judicial process by ruling against plaintiff; and (7) defendant Rothenberg violated plaintiff's constitutional rights by refusing to rule on plaintiff's motion for relief from judgment filed pursuant to Colo. R. Civ. P. 60(b)(3). Plaintiff sought declaratory and injunctive relief and damages.

The district court, pursuant to Fed. R.Civ. P. 12(b), dismissed plaintiff's 1983 claims for lack of subject matter jurisdiction. Plaintiff filed a motion for reconsideration, which the district court denied. Plaintiff appeals the dismissal of the 1983 claims.

A federal district court does not have authority to review a state court decision where, as in this action, the relief sought is by nature appellate review. Anderson v. Colorado, 793 F.2d 262, 263 (10th Cir. 1986); Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986); see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983). The district court properly dismissed plaintiff's claims for lack of subject matter jurisdiction.

Defendant moved for sanctions on appeal. Plaintiff has had an opportunity to respond to this request.

> Courts have the inherent power to impose a variety of sanctions on...litigants...in order to regulate their docket, promote judicial efficiency, and deter frivolous filings. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-67...(1980); Link v. Wabash R. Co., 370 U.S. 626, 632...(1962); Whitney v. Cook, 99 U.S. (9 Otto) 607...(1878). In addition, Fed R. App. P. 38 and 28 U.S.C. 1912 provide that a court of appeals may award just damages and single or double costs if the court "determine(s) that an appeal is frivolous" or brought for purposes of delay. This court has imposed attorney's fees and double costs for the taking of frivolous appeals in other contexts. See, e.g., United States v. Rayco, Inc., 616 F.2d 462, 464 (10th Cir. 1980.

Stafford v. Commissioner, 805 F2d 895, 896 (10th

Cir. 1986; Stafford v. Commissioner, 805 F.2d 893, 894-95 (10th Cir. 1986). In light of plaintiff's legally frivolous appeal, an award of damages and double costs is justified.

The judgment of the United States District Court for the District of Colorado is AFFIRMED, and the case is REMANDED to the district court to determine the amount of sanctions to be awarded for taking a legally frivolous appeal. The district court may look to the principles that have evolved in the interpretation of Rule 11 in assessing the amount of the sanction awarded pursuant to Rule 38 and 1912. See Atkinson v. O'Neill, __ F.2d __, No. 88-1132, slip op. at 4-5 (10th Cir. filed Feb. 10, 1989); Mullen v. Household Bank-Federal Sav. Bank, __ F.2d __, No. 87-1335, slip op. at 5 (10th Cir. Filed Feb 10 1989).

The mandate shall issue forthwith.

ENTERED FOR THE COURT

PER CURIAM

APPENDIX C

APP 12

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

Robert L. Hoecker (303)844-3157
Clerk April 17, 1989 FTS564-3157

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Mr. Jack E. Fleming
3624 Citadel Drive North
Suite 250
Colorado Springs, CO 80909

Re: 88-1922, Fleming v. Rothenberg
(Lower docket: 88-C-490,)

APP 13

Dear Counsel, Mr. & Ms. Fleming:

Enclosed is a copy of an order entered today in the captioned case.

Please call this office if your have questions.

Sincerely,

ROBERT L. HOECKER

Clerk

RLH:kas

Enclosure

APP 14

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JACK E. FLEMING	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 88-1922
	)	
SANDRA ROTHENBERG; KIM B. CHILDS; DAVID KOFOED; SCOTT LARSON; LAW FIRM OF COOPER & KELLEY; AMERICAN HOME ASSURANCE COMPANY,	)	
	)	
Defendants-Appellees.	)	

ORDER

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, and ROGERS, District Judge.*

* The Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

This matter is before the court on appellant's petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original

disposition was correct. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to whom the case was submitted, the petition for rehearing with suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

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ROBERT L. HOECKER, Clerk